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81-2116
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PETTIBONE CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit erred in adopting the National Labor Relations Board's *Wright Line* standard, which provides that once the Board's General Counsel makes a *prima facie* showing that conduct protected by the National Labor Relations Act was a motivating factor in an employer's decision the employer must *prove* that it would have made the same decision in the absence of the protected conduct.

2. Whether the Seventh Circuit erred in enforcing the National Labor Relations Board's conclusion that Petitioner refused to rehire five former employees because they engaged in protected activities where there is no direct record evidence and it is unreasonable to assume that the decision-makers were aware of the protected activities, and where there is no record evidence of disparate treatment.

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v.

NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, PETTIBONE CORPORATION ("Petitioner" or "the Company"),[1] respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on March 15, 1982.[2]

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[1] Pursuant to Rule 28.1 of the Rules of the Court, Petitioner states that it has no parent company and that the following entities are its subsidiaries and/or affiliates: Barko Hydraulics, Inc.; Beardsley & Piper Division; Cleveland Frog & Crossing Company; Hammermills, Inc.; Hanson Machinery Co.; Johnston & Jennings Division; National Iron Division; Pettibone Alabama Division; Pettibone (Canada) Limited; Pettibone Credit Corporation; Pettibone De Mexico, S. A. de C. V.; Pettibone International Sales Corp.; Pettibone Mercury Corporation; Pettibone Michigan Corporation; Pettibone New York Division; Pettibone Ohio Corporation; Pettibone Texas Corporation; Pettibone Westrac Division; and Universal Engineering Corporation.

[2] The Company filed a timely Petition for Rehearing on March 29, 1982. The order denying that Petition, dated April 13, 1982, is reproduced herein as Appendix C.

REFERENCE TO OPINIONS BELOW

The opinion of the Court of Appeals is unpublished; it is reproduced herein as Appendix A. The opinion of the National Labor Relations Board ("the Board") is reported at 255 N.L.R.B. No. 151 and is reproduced herein as Appendix B.

JURISDICTION

The Company sought review of the Board's decision in the Court of Appeals pursuant to the provisions of 29 U.S.C. § 160(f)(1976). The judgment of the Court of Appeals was entered on March 15, 1982.[3] On March 29, 1982, the Company filed a timely Petition for Rehearing, which was denied on April 13, 1982 (C1). On April 22, 1982, the Court of Appeals granted the Company's Motion for a stay of its mandate to and including May 20, 1982. The order granting the stay is reproduced herein as Appendix D. This Petition for Certiorari was filed within ninety days of the denial of the Petition for Rehearing in accordance with the requirements of 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutory and regulatory provisions involved are section 7(c) of the Administrative Procedure Act, as amended, 5 U.S.C. § 556(d); sections 7, 8(a)(1), 10(c) and 10(f) of the National Labor Relations Act, as amended ("the Act"), 29 U.S.C. §§ 157, 158(a)(1), 160(c) and 160(f); and the Board regulation cited as 29 C.F.R. § 101.10(b)(1981). They are reproduced herein as Appendix E.

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[3] Although Daisy Frison, Delores Jones, Corene Jones, Pandora Mitchell and Barbara Thomas were parties to the proceedings before the Board, they were not parties to the proceedings before the Seventh Circuit.

STATEMENT OF THE CASE

In its decision below, the Board found that Petitioner, a large manufacturer of heavy industrial equipment (B4, 10), violated section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), in two ways. First, the Board found that on April 5, 1979 Company Operations Manager Michael Lanphier violated section 8(a)(1) by threatening six Company keypunchers, who were not and had never been the subject of a union organizing campaign (Tr. 231-33), after *they* threatened not to work during a busy work period, vociferously complained about working conditions and asked for a raise (B4-6). Specifically, the Board found that, in response to the keypunchers' verbal attack on him, Lanphier became angry with the keypunchers, told them that their raise request would go against them, that "management" was upset, that they were free to leave, and that he could replace the whole department (B5-6).

Second, the Board found that on or about April 19, 1979, after the keypunchers engaged in a two-day "sick-out" on April 9 and 10 to protest working conditions, and after five of them voluntarily quit without giving any prior notice and thereafter requested rehire,[4] Corporate Division Controller Michael Craig and Vice-President Thomas Cavendar violated section 8(a)(1) by refusing to rehire the five keypunchers because of their activities protected by Section 7 of the Act (presumably, their April 5 complaining, and April 9 and 10 "sick-out") (B6-12).[5] To support its conclusion that Craig and Cavendar were motivated by the keypunchers' protected activities when they

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[4] One keypuncher was not a party to the Board proceedings and was not afforded any individual relief by the Board.

[5] Section 7 provides in pertinent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." 29 U.S.C. § 157.

refused to rehire them, the Board relied on Lanphier's alleged threats and its finding that Craig and Cavendar's proffered reason for refusing rehire — namely, that the keypunchers quit without giving prior notice in violation of Company policy — was a pretext (B10-12). However, the Board did not specifically find that either Craig or Cavendar were even aware of the keypunchers' protected activities.

On March 15, 1982, the Seventh Circuit enforced the Board's decision in full. Despite the absence of direct evidence in the record to support a finding that Craig or Cavendar knew of the keypunchers' protected activities, the court concluded that they had such knowledge (A2). The court then upheld the Board's findings that Craig and Cavendar's proffered reliance on the notice policy to refuse rehire was a pretext and that Craig and Cavendar decided not to rehire the keypunchers because of their protected activities (A2-3).

On March 29, 1982, Petitioner filed a Petition for Rehearing with the Seventh Circuit arguing, *inter alia*, that its decision to enforce the Board's finding that Craig and Cavendar's refusal to rehire the keypunchers was motivated by protected activities is irreconcilable with its decision in *NLRB v. Pfizer*, 629 F.2d 1272 (7th Cir. 1980) (*per curiam*), wherein the Court denied enforcement of a Board finding of illegal motive in a refusal to hire context. On April 13, the Seventh Circuit denied the Company's Petition for Rehearing (C1), but, on April 22, stayed the issuance of its mandate to and including May 20, 1982 (D1). Petitioner now seeks review by this Court of the Seventh Circuit's decision insofar as it concerns the propriety of Craig and Cavendar's refusal to rehire decision.[6]

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[6] Although the Company contests the validity of the Board's finding that Lanphier made illegal threats, the Company does not urge that error as a basis for review before this Court.

REASONS FOR GRANTING THE WRIT

A.

The Seventh Circuit's Approval Of The *Wright Line* Standard Is In Conflict With Decisions Of This Court And Other Courts Of Appeals, And Presents A Question Which Has A Dramatic Impact On The Administration Of The Act.

This case presents the critical question of what burden of proof an employer must sustain to defend successfully an allegation that activity protected by section 7 of the Act illegally motivated an employment decision.[7] In *Wright Line, A Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, ____ U. S. ____, 109 L.R.R.M. 2779 (1982), the Board attempted to set forth the allocation of burdens and order of presentation of proof in an illegal motive case under the Act. *Wright Line* requires that General Counsel of the Board make a *prima facie* showing that protected conduct was a motivating factor in the employer's decision, and, once this is established, that the employer *prove* (i.e., the employer has the burden of persuasion) that it would have made the same decision in the absence of protected conduct. *Id.*, 251 N.L.R.B. at 1089, 1084 n.5, 1088 n.11. The

[7] While Petitioner did not raise this issue below, consideration of issues not presented in a Court of Appeals is not beyond this Court's power of review and such issues have been addressed by this Court in appropriate circumstances. *Cuyler v. Sullivan*, 446 U.S. 335, 342 n.6 (1980); *Vance v. Terrazas*, 444 U.S. 252, 258-259 n.5 (1980); *Blonder-Tongue v. University Foundation*, 402 U.S. 313, 320 n.6 (1971); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 66, 68-69 (1938). Moreover, where, as here, there has been a recent, significant change in the law, this Court frequently has allowed parties to raise before it an issue for the first time. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 142-145 (opinion of Harlan, J.), 172 n.1 (separate opinion of Brennan, J.) (1967); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Uebersee Finanz-Korp., A.G. v. McGrath*, 343 U.S. 205, 213 (1952); *Hormel v. Helvering*, 312 U.S. 552, 556-557 (1941). Thus, Petitioner submits that this issue is properly before the Court.

Seventh Circuit adopted the *Wright Line* standard in *Peavey Co. v. NLRB*, 648 F.2d 460 (7th Cir. 1981), and applied *Peavey* in this case (A3).

The Board's *Wright Line* standard is of considerable importance because the allocation of the burden of proof can make the difference in a close case. In point of fact, the evidence in this case is so weak and insubstantial, *see, infra*, pp. 10-15, that the Board's finding that Craig and Cavendar were illegally motivated in their refusal to rehire decision surely would have been otherwise had the burden of proof not transferred to Petitioner. The Board itself in *Wright Line* recognized that many close cases turn on the allocation of the burden of proof: "This distinction [whether General Counsel or the employer has the burden of proof] is a crucial one since the decision as to who bears this burden can be determinative." *Wright Line*, 251 N.L.R.B. at 1087.

The Board's attempt in *Wright Line* to shift the burden of proof onto the employer conflicts dramatically with General Counsel's statutory burden as defined by section 10(c) of the Act, 29 U.S.C. § 160(c), to prove an unfair labor practice by a preponderance of the evidence. The Board interprets section 10(c) to mean that "[t]he Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act." 29 C.F.R. § 101.10(b). Moreover, section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), mandates: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

Notwithstanding that these statutory and regulatory provisions clearly require General Counsel, and not the employer, to prove that the employer's anti-section 7 animus was the cause of its decision, the *Wright Line* analysis places on the employer the burden of disproving that fact. Under *Wright Line*, an employer who advances a legitimate reason for its decision but does not satisfy the burden of persuasion would be found in

violation of the Act, despite the fact that the Board never determined which reason was the cause of the employer's decision.

Recognizing that the Board's attempt to shift the burden of proof onto the employer is directly contrary to section 10(c) of the Act, as well as to the Board's own regulations, the Court of Appeals for the Third Circuit in *Behring International, Inc. v. NLRB*, ___ F.2d ___, 109 L.R.R.M. 3265, 3269 (3d Cir. 1982), recently concluded that "[t]he Board . . . has no [statutory] power to shift that burden onto the employer." The Court of Appeals for the First Circuit in *NLRB v. Wright Line*, 662 F.2d at 904, similarly noted: "[W]e disagree with the Board on the narrow issue of defining the exact nature of the burden which the employer thus acquires. Section 10(c), as well as the Board's own regulation, make clear that the general counsel must prove the employer's guilt by a preponderance of the evidence . . . ." *Id.* at 904. The First Circuit in *NLRB v. Transportation Management Corp.*, ___ F.2d ___, 109 L.R.R.M. 3291, 3292 (1st Cir. 1982), recently reaffirmed that it has "rejected . . . any effort by the Board to impose a greater burden than . . . [neutralizing the implication of sufficient anti-section 7 motive] upon the Company, as outside the Board's statutory authority."

Departing from the *Wright Line* test, both the First and Third Circuits concluded that the more appropriate test is found in this Court's recent decision in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). *Burdine* reaffirmed the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Burdine* at 252-56. Applying the *Burdine* formula by analogy, once General Counsel proves a *prima facie* violation of the Act, the employer need only articulate a legitimate reason for its actions, and unless General Counsel proves that the proferred reason was a pretext, the employer will prevail.

The employer does *not* have the burden of persuading the trier of fact that it relied on the proferred reason. The burden of persuasion never shifts from General Counsel. *Behring International,* 109 L.R.R.M. at 3270; *Wright Line,* 662 F.2d at 906-07; *Transportation Management Corp.,* 109 L.R.R.M. at 3292. Since "[d]iscrimination in employment because of race, religion, or nationality is often as subtle and as difficult to ferret out as that resulting from antiunion [or anti-section 7] bias," the court in *Behring International* rightly concluded that the Board should follow the *Burdine* procedure. *Behring International,* 109 L.R.R.M. at 3269.

That this case presents an important question is further evidenced by the fact that there is a split in the circuits on the issue of whether the burden of persuasion shifts to the employer once General Counsel proves a *prima facie* violation of the Act. While some courts of appeals have upheld the Board's practice of imposing the burden of persuasion on the employer, *Red Ball Motor Freight, Inc. v. NLRB,* 660 F.2d 626 (5th Cir. 1981), *petition for cert. filed,* 50 U.S.L.W. 3742 (U.S. March 1, 1982) (No. 81-1605) (*Wright Line* question raised in petition for certiorari); *NLRB v. Fixtures Mfg. Corp.,* 669 F.2d 547 (8th Cir. 1982); *NLRB v. Consolidated Freightways,* 651 F.2d 436 (6th Cir. 1981); *Peavey* (7th Cir.); *NLRB v. Nevis Industries, Inc.,* 647 F.2d 905 (9th Cir. 1981), other courts of appeals, as noted earlier, have expressly rejected the burden-shifting aspect of the *Wright Line* test. *Behring International* (3d Cir.); *Transportation Management* (1st Cir.); *Wright Line* (1st Cir.).[8]

Moreover, it must be noted that this Court granted certiorari in *Myers v. Connick,* 507 F. Supp. 752 (E.D. La.), *aff'd. without op.,* 654 F.2d 719 (5th Cir. 1981), *cert. granted,* ____

[8] Additionally, the Fifth Circuit in *TRW, Inc. v. NLRB,* 654 F.2d 307 (5th Cir. 1981) implicitly rejected the *Wright Line* burden-shifting analysis.

U.S. ____, 102 S.Ct. 1629, 50 U.S.L.W. 3708 (1982). One of the questions this Court will review in that case is whether, in a public employment context, the lower court erred in applying the allocation of burdens and order of presentation of proof enunciated in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), rather than the *Burdine* standard. *Myers*, 50 U.S.L.W. at 3708. Since the *Mt. Healthy* standard was adopted by the Board as the basis for *Wright Line*, 251 N.L.R.B. at 1089 (notwithstanding that none of the statutory or regulatory provisions with which the Board must comply were relevant in *Mt. Healthy*), this Court has decided to review the very issue presented herein, only in a public employment context. Obviously, private employers like public employers are victims of the same confusion over application of the *Wright Line/Mt. Healthy* standard versus the *Burdine* standard,[9] and private employers like public employers would benefit greatly from this Court's resolution of that confusion.

In sum, the Court's review of the propriety of the *Wright Line* standard in this case is important not only to Petitioner but also to employers generally, and is necessary to resolve a split in the circuits and ensure the consistent and evenhanded interpretation of the Act. Accordingly, Petitioner submits that the *Wright Line* issue merits this Court's review.

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[9] In the instant case, both the Board's decision and its brief to the Seventh Circuit mischaracterized the *Wright Line* test. The Board reversed the *Wright Line* order of proof in its decision by addressing first the issue of pretext and second General Counsel's evidence of illegal motive (B10-12; Company Brief 27-30), and then incredibly misstated the *Wright Line* test in its brief by arguing that Petitioner had the burden of proving that its reason was "legitimate" and "something more than a pretext" in addition to proving that it would have taken the same action absent the keypunchers' protected conduct (Board Brief 28-29; Company Reply Brief 7-8). Obviously, the Board is confused about its own standard to the detriment of Petitioner and employers generally. This confusion justifies this Court's attention.

B.

The Seventh Circuit's Decision That The Board's Illegal Motive Finding Was Supported By Substantial Evidence Is In Conflict With The Decisions Of This Court, The Seventh Circuit Itself And Other Courts Of Appeals, And Presents A Question Important To The Administration Of The Act.

A Board finding of illegal motive must be rejected not only if it is based on a refutation of the Board's statutory burden of proof, but also if it is not "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(f). Substantial evidence is more than a "mere scintilla." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951), *quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). To support a conclusion of a violation of the Act, the Board's illegal motive finding must be based on more than mere suspicion or speculation. *Universal Camera*, 340 U.S. at 477. It goes without saying that the courts will not lightly infer the existence of unlawful motive on the part of an employer. *Pelton Casteel, Inc. v. NLRB*, 627 F.2d 23, 30 (7th Cir. 1980).

Obviously, a record does not support a finding that an employer was motivated by section 7 activity in discharging an employee if it lacks evidence that the decision-maker had knowledge of that activity. *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714, 722 (5th Cir. 1973); *NLRB v. Mid-State Sportswear, Inc.*, 412 F.2d 537, 539 (5th Cir. 1969). This reasoning applies as well in a refusal to hire case. *Pfizer*, 629 F.2d at 1275. In certain cases, knowledge of section 7 activity may be imputed to the employer official who decides to discharge or not to hire. For example, the "small plant doctrine" provides that the small size of an employer, under certain circumstances, may justify imputing knowledge of section 7 activity. *Coral Gables Convalescent Home, Inc.*, 234 N.L.R.B. 1198, 1199 (1978). However, this doctrine clearly does not apply to this case because the Company is not a small

employer. In 1979, Petitioner employed approximately 1,200 employees at its Chicago plant, where the alleged unfair labor practices occurred, and many if not most of the employees had been represented by eight different unions for decades (B10; Tr. 231-33).

As the Seventh Circuit recognized, "[T]here is no direct evidence that Craig and Cavendar, the persons who made the decision not to rehire, were aware of the keypunchers' protected, concerted activities" (A2). Nonetheless, the court concluded that such knowledge could be inferred circumstantially for three reasons: (1) Lanphier reported the keypunchers' requests about working conditions to "management" on April 5 and Craig and Cavendar ranked above Lanphier in the line of managerial supervision, (2) neither Craig nor Cavendar testified that they were unaware of the keypunchers' activities and (3) the "sick-out" apparently disrupted operations and required borrowing employees from other departments (A1-2). These reasons simply do not satisfy this Court's substantial evidence standard: (1) Lanphier's reporting to "management" more likely referred to Company Overall Manager for Systems and Computer Room Thomas Nast, his immediate supervisor who also met with the keypunchers before they quit, than to Craig or Cavendar, his distant superiors who never even spoke with the keypunchers before they quit (B7; Tr. 212-14, 219), (2) the failure of Craig and Cavendar to disprove their knowledge is meaningless because the *Board* had the burden of proof of knowledge, and (3) Petitioner's large size belies the notion that a two-day absence of and substitution for six employees would be known by top management.

Even more tenuous is the Seventh Circuit's conclusion that Craig and Cavendar *relied* on the keypunchers' protected activities to deny them rehire (A2-3). Substantial evidence of reliance, in the Seventh Circuit's view, was "the background of Lanphier's recent unlawful conduct" and the facts that the

Company notice policy, on which Craig and Cavendar said they relied, was unwritten or not communicated to employees, Company supervisor Earline Elam was unaware of the policy and Company witnesses did not testify as to the policy's age, origin or precise working details (A2-3). However, Lanphier's conduct offers no support for a finding of illegal motive on Craig and Cavendar's part because there is no record evidence that Craig and Cavendar even knew of Lanphier's conduct. The alleged threats and the refusal to rehire were two separate events involving different management representatives. *See NLRB v. P.P.G. Industries, Inc.*, 579 F.2d 1057, 1060 (7th Cir. 1978) (employer legitimately refused rehire where decision-maker and supervisor who claimed applicant for rehire had filed "harassing" grievances were not the same person).

The unwritten aspect of the Company notice policy likewise is not determinative. *See Stone & Webster Engineering Corp. v. NLRB*, 536 F.2d 461, 466 (1st Cir. 1976) (employer legitimately relied on unwritten rationale). That the policy was unwritten and the fact that the notice policy was not communicated to employees is eminently understandable given the common sense notion recognized by the *Board* that an employer should not rehire an employee who quits without giving notice, leaving the employer in the lurch, lest the employee repeat his transgression, *Nutrena Mills Cargill, Inc., Nutrena Mills Division*, 172 N.L.R.B. 183, 190 (1968); *see also NLRB v. Rich's of Plymouth, Inc.*, 578 F.2d 880, 887 (1st Cir. 1978) (employer's unwillingness to rehire employee who quit without notice is understandable), and the obvious inappropriateness of an employer's discussing quitting with employees at the beginning of or during their term of employment. That Elam was unaware of the policy is insignificant because there were few examples of employees quitting without giving notice and then asking to be rehired, and because Elam was not responsible for the rehire decision (B7-9; Tr. 296). Finally, contrary to what the Seventh Circuit concluded, the Board's decision and the

uncontradicted record evidence reveal that the Company notice policy was long-standing, known by three Company managers who testified at the hearing, and applied in other cases; and the record is clear that those witnesses testified uniformly that the notice policy's details applied precisely in *this* case since the keypunchers gave no notice whatsoever before quitting (B7-ll; Tr. 212-20, 224, 231-34, 241-42, 266, 268-72).

Noticeably absent from the record and the decision of the Seventh Circuit is evidence of disparate treatment in the application of the Company notice policy (i.e., evidence that former employees of Petitioner who quit without giving any notice and without having engaged in protected activity *were* rehired). Disparate treatment is the essence of an illegal motive case. *NLRB v. Charles Batchelder Co.*, 646 F.2d 33, 40-4l (2d Cir. 1981); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1259-60 (7th Cir. 1980); *Delco-Remy Division, General Motors Corp. v. NLRB*, 596 F.2d 1295, 1305 (5th Cir. 1979); *cf. Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (Title VII discrimination). The absence of disparate treatment evidence reinforces the need for the Court's review.

The lack of substantial evidence is all the more obvious by the fact that the Seventh Circuit's decision in *Pfizer*, wherein the court denied enforcement of a Board decision, is irreconcilable with the Seventh Circuit's decision herein. In *Pfizer*, applicant Houstin Alexander was favorably interviewed by James Murphy, company personnel manager. After the interview, Murphy asked John Watts, industrial relations supervisor, to check Alexander's references. Watts solicited the opinion of Sharon Bauer, industrial relations supervisor of Alexander's previous employer, who told Watts that she could not speak favorably of Alexander's ability and job performance, that Alexander was an "ex-president of the Union who tends to be an instigator" and that he was a "troublemaker." *Pfizer* at 1274. Finally, Bauer advised Watts that he stay away from Alexander if Watts didn't "need further problems." *Id.*

Murphy testified that Watts told him that Alexander had had performance problems and had been a union president. Murphy thereafter decided not to hire Alexander, testifying that his reason for doing so was because it was his personal policy not to hire an applicant whose prior employer would not rehire him. The court cited no evidence that Murphy's policy was written or communicated to employees and supervisors; in fact, because the policy was unique to *Murphy*, not his company, *id.* at 1274, the policy was unwritten and not disseminated. Moreover, the court cited no evidence of the age or origin of Murphy's policy, and Murphy's statement and testimony about the general working details of the policy were inconsistent and therefore imprecise. *Compare id.* at 1274 *with id.* at 1276.

Thus, in *Pfizer*, decision-maker Murphy refused to hire an applicant whom (according to his direct testimony) Murphy knew to have been engaged in section 7 activities; herein, decision-makers Craig and Cavendar refused to hire the keypunchers and there is no record evidence of their knowledge of the keypunchers' section 7 activities. In *Pfizer*, Murphy's policy rationale was unique to him and thus unwritten and not disseminated, and its age, origin and precise working details were unknown; herein Craig and Cavendar's policy rationale was unwritten but was long-standing and known by three Company managers who substantiated its precise application in this case. In *Pfizer*, the Seventh Circuit found substantial evidence lacking and concluded that Murphy's decision was "fully consistent with benign conduct," *id.* at 1277; it thus must follow *a fortiorari* that there is no substantial evidence for the conclusion that Craig and Cavendar's decision was illegally motivated.

In sum, this case presents not only the question whether the Board can refute its statutory burden of proof obligation but also the question whether the Seventh Circuit failed to comply with this Court's *Universal Camera* substantial evidence standard. To ensure that the substantial evidence requirement is

not replaced by a standard of mere suspicion and speculation, and to resolve the conflict between this case and the decisions noted earlier, especially the Seventh Circuit's own decision in *Pfizer, see Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950) (certiorari granted because of intracircuit conflict), this Court should grant review.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted

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Unpublished Order
Not To Be Cited
Per Circuit Rule 35

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

(ARGUED: FEBRUARY 23, 1982)

MARCH 15, 1982

Before

Hon. Jesse E. Eschbach, *Circuit Judge*
Hon. Thomas E. Fairchild, *Senior Circuit Judge*
Hon. Milton I. Shadur, *District Judge**

PETTIBONE CORPORATION, *Petitioner,* vs. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.
No. 81-1679	255 NLRB No. 151

ORDER

There is evidence in the record that the keypunch employees engaged in protected, concerted activity. Lanphier's statements and actions on April 5, 1979—including his being angry, banging on the desk and telling the employees that their raise request would be held against them, that management was upset, that they would not get another "damn dime" in 1979, that they were free to leave and that he could replace the whole

* District Judge Milton I. Shadur of the Northern District of Illinois is sitting by designation.

department—tended to interfere with the exercise of their Section 7 rights. The ALJ and Board correctly found that Lanphier's conduct constituted a violation of Section 8(a)(1). We will not overturn the credibility determinations made by the ALJ and affirmed by the Board, because the credited testimony is not on its face "hopelessly incredible." *Certain-Teed Products Corp. v. NLRB*, 562 F.2d 500, 505 (7th Cir. 1977).

True enough there is no direct evidence that Craig and Cavendar, the persons who made the decisions not to rehire, were aware of the keypunchers' protected, concerted activities. However it was reasonable for the Board to infer that fact circumstantially because:

1. Crain and Cavendar ranked above Lanphier in the line of managerial supervision, and Lanphier testified that he relayed their requests to "management" and that "management" was upset.

2. Neither Craig nor Cavendar testified that he was unaware of the keypunchers' activities (Craig testified during the Board proceedings, while Cavendar did not).

3. It could reasonably be inferred that Craig and Cavendar would have known of the sick-out because it apparently caused serious disruption of operations and required the borrowing of employees from other departments.

Those facts, when viewed against the background of Lanphier's recent unlawful conduct, were sufficient to support a finding that the employees' protected, concerted activities were a motivating factor in the decisions not to rehire.

Moreover, the Board found that Pettibone's assertion that the decisions were based on company policy was a transparent pretext. That finding is not clearly erroneous, inasmuch as the record shows that the alleged policy had never been put in

writing or communicated to employees, that even supervisor Elam was unaware of it and that Pettibone's witnesses were unable to furnish any testimony as to the purported policy's age, origin or precise working details. We do not imply by this ruling that the company should be expected to notify each employee who quits without notice that he or she will not be considered for rehiring. Instead we consider that on the record before the Board it could reasonably conclude that no such policy existed in fact. In turn, the company's advancement of a pretextual reason could reasonably be considered by the Board in weighing the other evidence before it.

Accordingly, Pettibone failed to show that the employees would not have been rehired in the absence of their protected conduct. *See Peavey Co. v. NLRB*, 648 F.2d 460 (7th Cir. 1981). There is substantial evidence to support a finding that the failure to rehire the keypunchers violated Section 8(a)(1).

While there appear to be certain imperfections in the decision of the ALJ, they are not determinative of the issues before us. Accordingly, the Board's order will be enforced.

Unpublished Per Curiam Order

NLRB JUDGMENT—ORAL ARGUMENT

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

March 15, 1982

Before

Hon. Jesse E. Eschbach, *Circuit Judge*
Hon. Thomas E. Fairchild, *Senior Circuit Judge*
Hon. Milton I. Shadur, *District Judge**

PETTIBONE CORPORATION,
Petitioner,
No. 81-1679 vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board
255 NLRB No. 151

This cause came on to be heard on the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the order of the National Labor Relations Board is ENFORCED, with costs, in accordance with the opinion of this Court filed this date.

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* District Judge Milton I. Shadur of the Northern District of Illinois is sitting by designation.

255 NLRB No. 151

D—7634
Chicago, IL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PETTIBONE CORPORATION

and

Case 13—CA—18642

DAISY FRISON, an Individual

DECISION AND ORDER

On January 19, 1981, Administrative Law Judge Harold Bernard, Jr., issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

D-7634

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Pettibone Corporation, Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

Dated, Washington, D.C. April 20, 1981

John H. Fanning, *Chairman*

Howard Jenkins, Jr., *Member*

Don A. Zimmerman, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

JD-16-81
Chicago, IL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

PETTIBONE CORPORATION

and **Case 13-CA-18642**

DAISY FRISON, An Individual

Linda McCormick, Esq., of Chicago, IL, *for the General Counsel.*
Ralph A. Morris, Esq., of Chicago, IL, *for the Respondent.*

DECISION

Statement of the Case

HAROLD BERNARD, JR., Administrative Law Judge: This case was heard on November 5 and 6, 1979, in Chicago, Illinois on complaint issued May 1979 alleging, as later amended, that the Respondent threatened employees with economic reprisals, and refused reinstatement to employees, because of their protected concerted activity, thereby violating Section 8(a)(1) of the Act. Respondent denies the commission of any unfair labor practices.

Upon consideration of the entire record, the demeanor of the witnesses and the briefs filed by the parties, I make the following:

Findings and Conclusions

I. Jurisdiction

The parties agree, the record shows, and I find that Respondent, a heavy industrial equipment manufacturer in Chicago, Illinois, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Unfair Labor Practices

On April 5, 1979, keypunch operator supervisor Earline Elam told employees in her department that unlike the prior year, when some of such work was sent out, operations manager Mike Lamphier wanted the group to do all the inventory this year—that the inventory cards were coming in and due to the employees' good work in inventory the previous year, he intended to assign them all the work. The keypunch operators punch documents from Respondent's factory offices, timecards, and job tickets, providing input to Respondent's computer systems. This news from Elam was greeted by employees with some misgivings because of difficulty arising from inaccuracies in the coding information and because the work would require substantial overtime hours. The record shows that, in addition, in their view the keypunch employees worked in crowded, dusty, unair-conditioned unsatisfactorily lighted and even hazardous physical surroundings—that the news of Lamphier's expected assignment prompted them, as a group, to request a meeting with him on the subject.

The Meeting on Thursday, April 5

Lamphier came upstairs from the computer room and met with employees at 9:30 a.m., informing them he had 80,000

cards he wanted punched and verified, in about 2 weeks, or some one-half the time required the previous year. Employees raised objections about working conditions pointing out the lack of air-conditioning and the difficulty of doing the work in the afternoon after regular working hours. Employees also raised objections to poorly-lit surroundings in the keypunch operators' working area, and to being "hemmed in" by empty boxes resulting in narrow passageways and a partially blocked fire exit stairway. As discussion continued, employee Corene Jones asked about a raise in pay for the keypunch operators and Lamphier replied that the employees had already gotten one in January—a reference to Respondent granting a "government guideline"—type increase at that time—whereupon Jones told him, "We still want a raise now." Keypunch operator Barbara Thomas told Lamphier ". . . if not a raise what about a bonus or something?" referring to the fact that this was going to be extra work. When Lamphier told the employees he would "see" about getting the raise but did not think they would get one, Jones asked if there was anyone else ". . . we could go to?" Lamphier replied, "No, I do not want you to get in any *trouble.*" (Emphasis added.)

Lamphier returned upstairs later that afternoon and I find from employee accounts in the face of Lamphier's substantial admissions and only partial failure to recall, that he told them heatedly, at times banging the desk, that management was angry because they asked for a raise, that they were not going to get another damn dime this year and if they did not like it that they could leave. I further find credible the testimony by Corene Jones corroborated by Delores Jones, that Lamphier told the assembled group of keypunch operators, Corene Jones, Arline Turner, Pandora Mitchell, Delores Jones, Barbara Thomas, and Daisy Frison, that ". . . he was red (faced) and he also said that when it came time for our (salary) review that it would go against us." Agreed supervisor Elam supports em-

ployee accounts that Lamphier also told employees, "there is the door" and that they were free to leave. Employee Jones also credibly testified that employee Frison asked why it "would go against us," and "if we were not going to get a raise, why there would be a review." Jones recalls further Lamphier telling them ". . . we were not going to get anything and that if we did not like it then we could all leave, that he could replace the whole department." At the conclusion in Lamphier's remarks, the group indicated willingness to perform the inventory and the meeting ended. It is axiomatic that the employees' discussion of working conditions and request for a pay increase to Lamphier at this meeting constituted the clearest form of protected concerted activity under the Act, and that therefore Lamphier's threatened economic and employment-related reprisals, *viz*, that their conduct would go against them in their pay reviews and reference to replacing them because of those activities, the only basis shown by the record for such responses, is a violation of Section 8(a)(1) of the Act. I so find.

April 9 and 10

When Lamphier departed, Frison, C. Jones, Mitchell, D. Jones, and Thomas discussed Lamphier's responses among themselves, expressing resentment over Lamphier's statements and conduct generally. The group decided in Frison's words that whoever could come in on the following Saturday, April 6, to do inventory would come and if anybody had something else to do ". . . we'd do that." Frison was out of town Friday and Saturday but C. Jones, Thomas, and Mitchell worked. Also, deciding that since Lamphier had talked to them that way, and "they" (Respondent) would be hurt by (employees not working Tuesday) Monday and Tuesday, the keypunch operators called in sick on the following Monday and Tuesday, April 9 and 10, and did not report for work those days.

The Employees Quit on Wednesday, April 11

After Elam asked Lamphier to do something Tuesday, April 10, in light of the employees' obviously concerted action, suggesting he talk to them, Lamphier agreed to do so and Elam contacted the employees through one of them, by telephone asking them to return Wednesday, April 11, for a meeting with Lamphier. The next morning, the employees clocked in at 8 a.m. and worked until 9 a.m. when Lamphier was available to see them. The employees gathered in the computer room, where Lamphier apologized for losing his temper and left to respond to a call elsewhere. While absent, Lamphier's supervisor, Tom Nast inquired what had happened and after listening to a description of the events told the group that Lamphier should not have spoken to them angrily. When Lamphier returned, he asked if everything was straightened out and when one of the employees asked if there would be a raise, he said no. Lamphier told the employees they could return to work. Upon returning to their department upstairs, the group discussed events, some saying they could not work under such conditions, some noting the absence of any change in things, or Lamphier's attitude, and some expressing themselves as being too upset to work any further. As testified by Frison, in short, "We decided to quit," and did so. Elam urged caution and further deliberation on employees but finally called Lamphier about developments and was told to collect their badges and bring them downstairs. Instead, Lamphier and Tom Nast, themselves came upstairs and picked up the badges.

The Respondent's Refusal to Rehire the Former Keypunch Operators

The parties stipulate that the keypunch operators quit on April 11, and Respondent admits that it decided against rehiring them afterward due to a company policy against doing so whenever an employee has left without notice, variously

defined further by Respondent witnesses as "proper notice" or as "two weeks notice." But Respondent argues further that neither Corene nor Delores Jones ever requested rehiring and that Barbara Thomas, who likewise made no such request, was also not an employee but rather held the status of an independent contractor. There is no dispute that Frison and Mitchell called Craig for their jobs, on April 16, and were refused rehire—Frison being told it was out of the person's hands, the other simply "sorry." I further find that Corene Jones called in to Craig on the same day Frison called and was also refused rehire.

Regarding the issue raised by Respondent's allegation that Delores Jones and Thomas never asked to be rehired and thus were not refused reemployment, little more need be noted than that Respondent's own witness and admitted keypunch supervisor, Earline Elam, in a meeting the week after the employees quit, when production matters were in a state of transition, attended by Elam, Lamphier and Respondent's corporate vice president Thomas Cavendar asked Respondent to put all the employees back to work. Elam testified, "Well, he asked me what he (Cavendar) could do for me. So I asked him could he get my girls back. And he told me that he cannot do that. He wished he could but he could not do that because the girls walked out and it was against the company policy to hire them back because they walked out like that." There is no room for any doubt in this record that Respondent knew the keypunch operators, two of whom admittedly called in to request rehire, one whom I find did so, Corene Jones and two whose conduct in this regard is in dispute, but all of whom were named in the original charge dated April 16, 1979, and served upon Respondent which alleges that Respondent refused to *reinstate* them had sought a return to work. It is not disputed that Respondent made no effort to countermand the decision not to rehire Elam's "girls" as communicated to Elam by Cavendar,

and, lest there be any question remaining, there is also no indication that from at least the date of the charge there was no reasonable question for Respondent to now seriously urge that the employees had not communicated a desire to return to work after quitting. Had there been any real question about the matter in Respondent's view of events, it is reasonable to suppose Respondent would have inquired into the charge allegation in such limited regard, but it made no such effort. Since Respondent's division comptroller Mike Craig testified that the Elam-described meeting occurred late in the same week ". . . that the girls called in," this would place the meeting wherein Cavendar denied Elam's request to rehire the employees as after the 16th of April, the day Frison and the two others testified they asked for their jobs back, and the charge was filed which, I find, effectively communicated to Respondent that the keypunch operators had sought to return to work but alleged they had been thwarted in those efforts. Based upon the foregoing, it is not within the realm of reasonable argument for Respondent to raise the thinly technical position, that it did in effect, not know the two employees, Thomas and Delores Jones wanted a return to their employment. I find that it did know and further, in light of the Elam-described meeting, that any additional requests, other than what did occur, would have been futile—in short Respondent's argument is academic and without merit. I find, regarding Mitchell, Frison, and Corene Jones that they asked for and were denied rehire on April 16, in calls to Mike Craig, and that D. Jones and Thomas were effectively denied rehire on April 19 (or 20), the date of the Elam-described meeting.

Barbara Thomas' Status

Except for an accommodation by Respondent with Thomas' work schedule whereby she is allowed to leave early to work elsewhere, and the absence of fringe benefits or

standard deduction in her compensation, Thomas' working conditions are identical with those of other admitted employees in the keypunch department. She receives the same rate of pay, works generally the same hours, doing the same work on the same equipment under the same immediate and overall supervision as other keypunch operators in the same office and with the same overtime work opportunities. The fact that Thomas "bills' the Respondent for such work, signs in on a paper and is paid out of a different account maintained by Respondent, does not alter the fact that Respondent totally controls Thomas' work efforts and compensation. I find that Thomas does not occupy the status of an independent contractor in her employment relationship with Respondent but rather is an employee with rights protected by the Act. She does not bear the earmarks of an independent entrepreneur with power to control her own profit and loss, but rather, is employed in this capacity, I find, for the obvious economic convenience of her employer. *Avis Rent A Car System, Inc.*, 173 NLRB 1366, 1367; *R. L. Stott Company and R. L. Stott Heating and Air Conditioning Company*, 183 NLRB 884, 885; and, *National Freight, Inc., Federal Freight, Inc., and Sun Transportation, Inc.*, 153 NLRB 1536, 1539.

Respondent's Policy Defense

Respondent urges that the employees were denied reemployment for the policy reason that they quit without notice and such action thereby prevented them from being considered for reemployment. Such position, however, is based upon a policy never reduced to writing, not communicated to keypunch operator supervisor Elam, and as to which only two examples—inapposite to the present case, out of 1,200 employees in 36 years were given. The flimsiness in the proof of such policy is further shown by the vagueness in details about how

the policy works and what constitutes notice, as well as the fact that its prior enforcement is put in serious question by the fact that one of the keypunch operators was rehired the year before the incidents in this case arose though she had given only a few days' notice, while on vacation, that she would not be returning to work the following week. I find it revealing that Respondent was unable to prove the existence of such a policy prior to the occurrences in this case and that its attempts to do so were so meager in the respects noted above. I further find it revealing that even were there to have been such a policy, it would not insulate unlawful conduct inasmuch as any employer policy penalizing employee exercise of rights guaranteed employees under Section 7 of the Act would have to give way to the policies of the Act. That the Respondent did not rely on such a "policy" seems to me to be borne out further by the fact that given the dire need for operators, Respondent having to "scrounge" around for employees when the former employees let it be known that they desired to return to work, something other than so illusory-like a policy must have fueled the Respondent's rejection of the employees' appeals for their work. Further substantiating this view is the fact that the employees involved had earned fine work records, free from any blemishes and, in fact, had all been complimented by supervision for their good work. Elam herself, described how the group had been praised, and given lunch, for filling in for Elam during the latter's absence from the department.

The only reason for Respondent's rejection of the keypunch operators emerging from the totality of considerations applicable herein, as described by Respondent's own witness Elam and noted above, as told her by Cavendar, was because the employees "... had walked out like that," in addition, I find, to their other efforts to improve working conditions described above. To cloak this unlawful response to employee concerted activity in the guise of a policy reason is

unavailing for Respondent, whether in the name of policy or as spontaneous retaliatory conduct, violated the Act by refusing the employees rehire because of their protected concerted activity, thereby further violating Section 8(a)(1) of the Act. Respondent's refusal to rehire the keypunch operators clearly" . . . did not occur as the automatic result of an infraction of a clearly announced and universally enforced employment policy." *Speed-O-Lith Offset Co., Inc.*, 241 NLRB No. 115 slip op. (1979). It follows from this that the advanced "policy" reason was a transparent pretext, a finding which warrants the conclusion, when combined with the employees' clearly protected activities, Respondent's knowledge thereof via Lamphier, Elam, Nast, Craig, and Cavendar and its animus towards those activities, that a clear preponderance of the evidence supports this determination. *First National Bank of Pueblo*, 240 NLRB No. 49 slip op. (1979), and *Petropak, Inc.*, 238 NLRB No. 141 slip op. (1978).

Conclusions of Law

1. Pettibone Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By threatening employees with reprisals because they engaged in protected concerted activities seeking to improve working conditions, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

3. By refusing to rehire Daisy Frison, Delores Jones, Corene Jones, Pandora Mitchell, and Barbara Thomas because they engaged in protected concerted activities seeking to improve working conditions, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

III. The Remedy

Having found that Respondent violated Section 8(a)(1) of the Act, the Respondent shall be ordered to cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully refused to rehire Daisy Frison, Delores Jones, Corene Jones, Pandora Mitchell, and Barbara Thomas, the Order will provide that the Respondent offer to each of them immediate and full reemployment to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their rights and privileges and to make each of them whole for any loss of earnings they may have suffered as a result of the unlawful conduct against them by payment to them of a sum equal to that which each normally would have earned, absent the unlawful conduct against them from the respective dates Respondent refused to rehire them to the dates of the Respondent's offers of reemployment with backpay and interest computed in accordance with the Board's established standards set forth in *F. W. Woolworth Company,*[1] and *Florida Steel Corporation.*[2]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[3]

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[1] 90 NLRB 289 (1950).

[2] 231 NLRB 651 (1977). See generally, *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).

[3] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

The Respondent, Pettibone Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with reprisals because they engaged in protected concerted activities seeking to improve working conditions.

(b) Refusing to rehire Daisy Frison, Delores Jones, Corene Jones, Pandora Mitchell, and Barbara Thomas because they engaged in protected concerted activities seeking to improve working conditions.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Daisy Frison, Delores Jones, Corene Jones, Pandora Mitchell, and Barbara Thomas immediate and full reemployment to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or other rights and privileges and make each whole for any lost earnings with interest thereon to be computed according to the formula described above in the section entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Chicago, Illinois, location, copies of the attached notice marked, "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material.

Dated, Washington, D.C. January 19, 1981

/s/ HAROLD BERNARD, JR.
Harold Bernard, Jr.
Administrative Law Judge

[4] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

JD-16-81

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A HEARING AT WHICH ALL PARTIES HAD AN OPPORTUNITY TO PRESENT THEIR EVIDENCE, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE NATIONAL LABOR RELATIONS ACT AND HAS ORDERED US TO POST THIS NOTICE AND TO CARRY OUT ITS PROVISIONS.

WE WILL NOT threaten employees that it will go against them in reviewing them for pay increases if they engaged in protected concerted activities seeking to improve working conditions.

WE WILL NOT threaten to replace employees in the keypunch operators department because employees there engage in protected concerted activities.

WE WILL NOT refuse to rehire DAISY FRISON, DELORES JONES, CORENE JONES, PANDORA MITCHELL, and BARBARA THOMAS because of their protected concerted activities Seeking to improve working conditions.

WE WILL offer the above-named immediate and full reemployment to their former jobs, or, if those jobs no longer exist, to substantially equivalent jobs, without loss of seniority or other rights and privileges, and WE WILL make each of them whole, with interest for any loss of earnings suffered by reason of our unlawful conduct against them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the National Labor Relations Act.

PETTIBONE CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, 219 S. Dearborn Street, Chicago, IL 60604, Telephone (312) 353-7597.

C1

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

APRIL 13, 1982

Before

Hon. Jesse E. Eschbach, *Circuit Judge*
Hon. Thomas E. Fairchild, *Senior Circuit Judge*
Hon. Milton I. Shadur, *District Judge**

PETTIBONE CORPORATION, *Petitioner,*	Petition for Review of an Order of the National Labor Relations Board.
No. 81-1679 *vs.*	
NATIONAL LABOR RELATIONS BOARD, *Respondent.*	255 NLRB No. 151

ORDER

On consideration of the petition for rehearing *en banc* filed in the above-entitled cause by counsel for the petitioner, which petition we consider as a petition for rehearing and a suggestion for rehearing *en banc*, no judge in regular active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

---

* District Judge Milton I. Shadur of the Northern District of Illinois is sitting by designation.

D1

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

APRIL 22, 1982

Before

Hon. Jesse E. Eschbach, *Circuit Judge*
Hon.
Hon.

PETTIBONE CORPORATION, *Petitioner.* **vs.** **NATIONAL LABOR RELATIONS BOARD,** *Respondent.*	Petition for Review of an Order of the National Labor Relations Board.

No. 81-1679

On consideration of the "MOTION FOR STAY OF MANDATE" filed herein on April 20, 1982, by counsel for the petitioner,

IT IS ORDERED that said motion is hereby GRANTED and the mandate of this court is stayed to and including May 20, 1982.

APPENDIX E

5 U.S.C.

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

. . . .

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof . . . .

. . . .

29 U.S.C.

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,

. . . .

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . .

§ 160. Prevention of unfair labor practices.

(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its

findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter . . . .

. . . .

(f) . . . [T]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall . . . be conclusive.

. . . .

29 C.F.R.

§ 101.10 Hearings

. . . .

(b) . . . The Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act [29 U.S.C. § 158] . . . .

. . . .

No. 81-2116

Office - Supreme Court, U.S.
FILED
SEP 24 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PETTIBONE CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PETTIBONE CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT

On May 17, 1982,[1] Petitioner, PETTIBONE CORPORATION ("Pettibone" or "the Company"), filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. *Pettibone Corp. v. NLRB,* No. 81-2116.[2] The Court has not yet ruled on that Petition.

The Company presented two questions in its Petition, the first of which was:

> Whether the Seventh Circuit erred in adopting the National Labor Relations Board's *Wright Line* standard,

---

[1] Unless otherwise indicated, all dates referred to herein occurred in 1982.

[2] Pursuant to Rule 28.1 of the Rules of the Court, the Company states that its listing relating to parent companies, subsidiaries and affiliates in its Petition at p. 1 n. 1 remains accurate.

> which provides that once the Board's General Counsel makes a *prima facie* showing that conduct protected by the National Labor Relations Act was a motivating factor in an employer's decision the employer must *prove* that it would have made the same decision in the absence of the protected conduct.

Company Pet. i. In its Petition, the Company noted that the Court of Appeals for the First Circuit in *NLRB v. Transportation Management Corp.*, 674 F.2d 130 (1st Cir. 1982) refused to adopt the Board's *Wright Line* standard.

On June 16, the Council on Labor Law Equality filed a brief *amicus curiae* in support of the Company's Petition. The Council noted that on May 24 the Court denied certiorari in *Red Ball Motor Freight, Inc. v. NLRB*, ____ U.S. ____, 102 S. Ct. 2282 (1982). *Red Ball* presented the same issue raised by Pettibone, namely, whether the Board's *Wright Line* standard is erroneous. Justice White, joined by Justice Rehnquist, recognized a conflict in the circuits concerning the *Wright Line* test and voted "to resolve this conflict on what is obviously a recurring issue that should be resolved." *Red Ball*, 102 S. Ct. at 2282 (White, J., dissenting from the denial of certiorari). On July 2, the Board filed a Brief in Opposition to the Company's Petition.

The purpose of this Supplemental Brief is twofold. First, the Company calls the Court's attention to the fact that on July 30, the Board filed a Petition for Certiorari in *NLRB v. Transportation Management Corp.*, No. 82-168. In its Petition, the Board reversed its position in *Pettibone* and *requested* that the Court grant a Writ of Certiorari in order to resolve the *Wright Line* question.

Second, the Company requests that the Court postpone consideration of its Petition until the date on which the Court will consider the Board's Petition in *Transportation Management*. A response to the Board's Petition has not yet been filed with the Court.

The Board has attempted to reconcile its position in *Pettibone* with its position in *Transportation Management* by stating that, in *Pettibone*, "the General Counsel had proved that the only legitimate reasons advanced by the employer for its action were pretexts." Board Pet. 10. This statement is unfounded. The Board did not find that General Counsel proved that Pettibone's articulated reason was a pretext; rather, the Board found that the *Company* did not prove the existence of and its reliance on the proffered reason. Company Pet. B10-12. The Court of Appeals agreed with this characterization of the Board's findings: "Pettibone failed to show that the employees would have been rehired in the absence of their protected conduct." Company Pet. A3.

Moreover, it must be noted that the Board initially opposed the Company's Petition because, in its opinion, *Pettibone* was a "pretext" case as opposed to a "dual motive" case. Board Br. in Opp. 6. This argument also does not reconcile the Board's positions in *Pettibone* and *Transportation Management*. As the Court of Appeals for the Ninth Circuit reasoned in *Zurn Industries, Inc. v. NLRB*, 680 F.2d 683 (9th Cir. 1982), a case cited approvingly by the Board as an endorsement of the *Wright Line* test, Board Pet. 8, the "distinction between pretextual and dual or mixed motive discharges is irrelevant" for purposes of the *Wright Line* analysis, *Zurn*, 680 F.2d at 686 n. 6. That reasoning applies in other alleged illegal motive contexts, such as the refusal to rehire situation presented in *Pettibone*. In addition, the fact that the Board labeled *Red Ball* a "pretext" case and then cited with approval Justice White's opinion that the Court should have granted certiorari in *Red Ball* to resolve the *Wright Line* issue refutes the Board's position that the *Wright Line* test does not affect what it calls "pretext" cases. *See* Board Pet. 10.

In sum, the Board now has recognized that the Company's Petition presents the same question "of considerable practical importance to the administration of the National Labor Rela-

tions Act" that is presented in the Board's Petition in *Transportation Management*. Board Pet. at 7. For that reason, Pettibone respectfully requests that the Court postpone consideration of its Petition until the date on which it will consider the Board's Petition in *Transportation Management* and, at that time, issue a Writ of Certiorari to the Court of Appeals for the Seventh Circuit.

Respectfully submitted

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No. 81-2116

FILED

In the Supreme Court of the United States

OCTOBER TERM, 1981

PETTIBONE CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner refused to rehire its five keypunch operators after they briefly quit because, shortly before they quit, they had engaged in a protected protest concerning their wages and working conditions.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2116

PETTIBONE CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not reported. The decision and order of the National Labor Relations Board are reported at 255 N.L.R.B. No. 151 (Pet. App. B1-B2).

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1982 (Pet. App. A4). The court of appeals denied a timely petition for rehearing on April 13, 1982 (Pet. App. C1). The petition for a writ of certiorari was filed on May 17, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth in the petition (Pet. App. E1-E2).

STATEMENT

1. Petitioner is a manufacturer of heavy industrial equipment (Pet. App. B4). On April 5, 1979, petitioner's five keypunch operators complained to Operations Manager Mike Lanphier about their wages and working conditions, particularly about a requirement that they do an extra work assignment without additional pay (*id.* at B4-B5). Lanphier informed them that the company management was very angry about their request for a raise, that their complaint would be held against them when their annual merit raise review took place, and that he could have the whole keypunch department replaced (*id.* at B5-B6). In protest of Lanphier's position, the five employees decided to call in sick on the following Monday and Tuesday, April 9 and 10, 1979 (*id.* at B6). After discussing their grievances with Lanphier and Information Systems Manager Tom Nast on their return to work on Wednesday, April 11, the keypunch operators, acting as a group, quit because of their dissatisfaction with their working conditions (*id.* at B7).

On Monday, April 16, the keypunch operators telephoned Division Controller Craig and requested that they be rehired. Craig responded that the keypunch operators could not be rehired. (Pet. App. B8.) Thereafter, on April 19, Corporate Vice-President Cavendar denied Keypunch Supervisor Elam's request that the keypunch operators be rehired,[1] asserting that, because the operators walked out, he was precluded by company policy from rehiring them (*ibid.*).

---

[1] As a result of the keypunch operators' decision to quit, the keypunch department had to borrow employees from other departments and to operate almost 16 hours a day (Pet. App. B11; Tr. 219-220). During the April 9 and 10 sick-out, employees also had to be borrowed from other departments to keep the keypunch department operating (Tr. 170, 196-197, 206-207). "Tr." references are to the transcript of the hearing before the Administrative Law Judge.

2. The Board, adopting the decision of the Administrative Law Judge, found that petitioner, in violation of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), threatened to deny the keypunch operators raises and to have them replaced because they had engaged in a protest protected by the Act (Pet. App. B1, B6). The Board found that petitioner further violated Section 8(a)(1) by refusing to rehire the keypunch operators because they had engaged in a protected protest (Pet. App. B1, B10-B12). In so ruling, the Board expressly found that Operations Manager Lanphier, Keypunch Supervisor Elam, Information Systems Manager Nast, Division Controller Craig, and Corporate Vice-President Cavendar had "knowledge" of the keypunch operators' protected protest (Pet. App. B12). The Board rejected as a "transparent pretext" petitioner's assertion that company policy prohibited company officials from rehiring employees who had quit without giving notice (*id.* at B1, B12). As the Law Judge explained, the alleged policy was (*id.* at B10-B11):

> * * * never reduced to writing, not communicated to keypunch operator supervisor Elam, and [one] as to which only two examples—inapposite to the present case, out of 1,200 employees in 36 years were given. The flimsiness in the proof of such policy is further shown by the vagueness in details about how the policy works and what constitutes notice, as well as the fact that its prior enforcement is put in serious question by the fact that one of the keypunch operators was rehired the year before the incidents in this case arose though she had given only a few days' notice, while on vacation, that she would not be returning to work the following week.

3. The court of appeals, by unpublished order, upheld the Board's decision. In affirming the Board's finding that petitioner had knowledge of the keypunch operators'

protected protest, the court, while acknowledging that there was "no direct evidence" that Division Controller Craig and Corporate Vice-President Cavendar had such knowledge, noted (1) that "Craig and Cavendar ranked above [Operations Manager] Lanphier in the line of managerial supervision, and Lanphier testified that he relayed [the keypunch operators'] requests to 'management' and that 'management' was upset"; (2) that "[n]either Craig nor Cavendar testified that he was unaware of the [keypunch operators'] activities * * *"; and (3) that "[i]t could reasonably be inferred that Craig and Cavendar would have known of the [keypunch operators'] sick-out because it apparently caused serious disruption of operations and required the borrowing of employees from other departments" (Pet. App. A2). In affirming the Board's finding that the reason advanced by petitioner for the refusal to rehire the keypunch operators was a "transparent pretext," the court noted (1) that "the [purported] policy had never been put in writing or communicated to employees"; (2) that "even [Keypunch Supervisor] Elam was unaware of [the purported policy]"; and (3) that "[petitioners'] witnesses were unable to furnish any testimony as to the purported policy's age, origin, or precise working details" (Pet. App. A2-A3).

ARGUMENT

1. The first question raised in the petition (Pet. 5-9)—whether the Board's decision in *Wright Line* v. *Lamoureux*, 251 N.L.R.B. 1083 (1980), enforced, 662 F. 2d 899 (1st Cir. 1981), cert. denied, No. 81-987 (Mar. 1, 1982),[2]

---

[2]In *Wright Line* the Board adopted the mode of analysis set forth in *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977), to determine whether an employee was discharged for protected union activity in violation of the National Labor Relations Act. Thus, once the Board's general counsel has established that opposition to the employee's protected activities was a "motivating factor" in the employer's discharge decision, the employer will nevertheless prevail if it can show that it would have taken the same action "even in the absence of the protected conduct." *Wright Line*, *supra*, 251 N.L.R.B. at 1089.

improperly shifts the burden of proof to the employer in a discriminatory discharge case—is not properly presented here. As petitioner acknowledges (Pet. App. 5 n.7), it did not raise this issue before either the Board or the court of appeals. Accordingly, the issue is not properly before this Court. See *Woelke & Romero Framing, Inc.* v. *NLRB*, No. 80-1798 (May 24, 1982), slip op. 20; *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[3]

In any event, even if petitioner's *Wright Line* contention were properly before this Court, it would not warrant review. Petitioner's contention rests essentially on the fact that, although every circuit that has considered the Board's *Wright Line* test has given it general approval,[4] the First and Third Circuits have held that the test improperly shifts

---

[3]The cases cited by petitioner (Pet. 5 n.7) where this Court has considered contentions that were not raised before the court of appeals involved either a situation where consideration of the contention that was not raised before the court of appeals was necessary to consideration of a contention that was raised (*e.g.*, *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980)), or a situation where the contention that was not raised before the court of appeals could not have been raised because the decisional authority underlying the contention had not yet been announced (*e.g.*, *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967)). Neither situation is involved in the present case. The Board's decision in *Wright Line* v. *Lamoureux*, 251 N.L.R.B. 1083, was issued in August 1980; the First Circuit's decision in *NLRB* v. *Wright Line*, 662 F. 2d 899, and the Fifth Circuit's decision in *TRW, Inc.* v. *NLRB*, 654 F. 2d 307—which represent two of the three circuit court decisions underlying petitioner's *Wright Line* contention—were both issued in September 1981. The court of appeals did not decide the present case until March 15, 1982, and it denied the petition for rehearing en banc on April 13, 1982.

[4]See *NLRB* v. *Robin American Corp.*, 654 F. 2d 1022, 1025 (5th Cir. 1981); *NLRB* v. *Lloyd A. Fry Roofing Co.*, 651 F. 2d 442, 446 (6th Cir. 1981); *Peavey Co.* v. *NLRB*, 648 F. 2d 460, 461 (7th Cir. 1981); *NLRB* v. *Fixtures Manufacturing Corp.*, 669 F. 2d 547, 550 (8th Cir. 1982); *NLRB* v. *Nevis Industries, Inc.*, 647 F. 2d 905, 909 (9th Cir. 1981); *Red Ball Motor Freight, Inc.* v. *NLRB*, 660 F. 2d 626 (5th Cir. 1981), cert. denied, No. 81-1605 (May 24, 1982).

the burden of proof from the general counsel to the employer because the burden that it imposes on the employer once the general counsel has made a prima facie showing of unlawful motivation is actually a "burden of persuasion" and not merely a "burden of production." *NLRB* v. *Wright Line, supra*, 662 F. 2d at 904; *NLRB* v. *Transportation Management Corp.*, 674 F. 2d 130, 131 (1st Cir. 1982); *Behring International, Inc.* v. *NLRB*, 675 F. 2d 83, 89-90 (3d Cir. 1982). See also *TRW, Inc.* v. *NLRB*, 654 F. 2d 307, 312 (5th Cir. 1981). But see *NLRB* v. *Fixtures Manufacturing Corp.*, 669 F. 2d 547, 550 n.4 (8th Cir. 1982).

Petitioner's contention, however, ignores the fact that the First and Third Circuits' criticisms of the *Wright Line* test are applicable only to "dual motive" cases and not to "pretext" cases. As the First Circuit itself has indicated, the problem of "the precise allocation of the burden of proof" arises only "in 'mixed motive' cases where both anti-union animus and legitimate business reasons exist" for the employer's action, and " 'niceties of burdens of proof' " do not govern cases where " 'the employer's allegedly legitimate reason for the [action] was a pretext.' " *NLRB* v. *Steinerfilm, Inc.*, 669 F. 2d 845, 850 (1st Cir. 1982) (citation omitted). Accord, *NLRB* v. *Magnesium Casting Co.*, 668 F. 2d 13, 16 (1st Cir. 1981). Since both the Board and the court of appeals found that the allegedly legitimate reason advanced by petitioner in the present case was a "transparent pretext," the First and the Third Circuits' criticisms of the *Wright Line* test are not applicable to this case.[5]

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[5]For similar reasons, *Connick* v. *Myers*, cert. granted, No. 81-1251 (Mar. 8, 1982), another "dual motive" case cited by petitioner (Pet. 8-9), is inapposite.

2. Petitioner also contends (Pet. 10-15) that the Board's finding that petitioner refused to rehire the keypunch operators because of their protected protest is not supported by substantial evidence on the record as a whole. Petitioner's contention, however, raises purely evidentiary issues and thus does not warrant this Court's review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, the court of appeals correctly concluded that—in view of (1) petitioner's knowledge of the keypunch operators' protected protest, (2) petitioner's unlawful threats to deny the keypunch operators raises and to have them replaced because of their protected protest, and (3) petitioner's transparently pretextual explanation for refusing to rehire the keypunch operators—substantial evidence supports the Board's finding that petitioner refused to rehire the keypunch operators because of their protected protest.[6]

---

[6]In *NLRB* v. *Pfizer, Inc.*, 629 F. 2d 1272, 1275 (7th Cir. 1980), relied on by petitioner (Pet. 13-15), the court of appeals rejected the Board's finding that the refusal to hire was unlawful because, unlike here, the general counsel introduced no evidence that any employer official was meaningfully aware of the protected employee conduct, and the employer introduced affirmative evidence that the decision-making official was not aware of the protected employee conduct. That the court of appeals did not reach the same result here reflects purely factual differences between the two cases, and does not, as petitioner contends, create an intracircuit conflict. In any event, an intracircuit conflict does not provide a basis for review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1982

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No. 81-2116

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF COUNCIL ON LABOR LAW EQUALITY IN SUPPORT OF PETITION FOR CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-2116

PETTIBONE CORPORATION,

PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT.

On Petition For A Writ Of Certiorari To
The United States Court of Appeals
For The Seventh Circuit

BRIEF AMICUS CURIAE ON BEHALF OF COUNCIL ON LABOR LAW EQUALITY IN SUPPORT OF PETITION FOR CERTIORARI

INTEREST OF AMICUS CURIAE*

The Council on Labor Law Equality ("COLLE") is a national association of

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*Pursuant to Rule 36.2 of the Rules of this Court, written consents of the

large and small employers formed to monitor the activities of the National Labor Relations Board and other developments relating to the NLRA and to give support in those cases or on those issues which affect a broad section of industry. COLLE was formed in recognition of the necessity for a specialized and continuing business community effort to provide assistance in the review of NLRB and court decisions in order to maintain a balanced approach in the interpretation of national labor policy.

Pettibone's certiorari petition presents the Court with an opportunity to resolve one of the most vexing issues that confront employers. The conflict that existed in the circuits regarding "dual motive" discharges prior to the Board's decision in Wright Line, a Division of Wright Line, Inc., 251 N.L.R.B. 1083 (1980), has not abated. The decision of the court below is in direct conflict with the First Circuit's Wright Line

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parties to the filing of this brief have been obtained and have been lodged with the Clerk of the Court.

decision[1] on the question of whether the Board's General Counsel can establish a violation of Section 8(a)(3), the discriminatory discharge prohibition of the Act, without bearing the burden of proof. The decision below also conflicts with the view of several circuits that the General Counsel cannot establish an 8(a)(3) violation without proving that union animus was the dominant motive of the employer.

The Council On Labor Law Equality (COLLE) has filed amicus curiae briefs with the Court in support of the certiorari petition in Wright Line, A Division of Wright Line, Inc. v. NLRB, No. 81-987, cert. denied,(March 1, 1982), ___U.S. ___, and in Red Ball Motor Freight, Inc. v. NLRB, No. 81-1605, cert. denied, May 26, 1982, ___ U.S. ___. The continuing conflict and divergent views of the circuit courts is highlighted in the dissenting views of Justice White and Justice Rehnquist set forth in the dissent from the denial of the petition for certiorari in Red Ball Motor Freight, Inc. Because

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[1]Wright Line, a Division of Wright Line, Inc. v. NLRB, 662 F.2d 899 (1st Cir. 1981).

of the continuing importance of this issue and the need for the resolution of this conflict at this time, COLLE is for the third time during this term of court filing a brief amicus curiae urging the Court to accept the important questions presented in the instant case.

SUMMARY OF THE CASE

In view of the recent denial of review of a similar question by the Court in Red Ball Motor Freight, Inc., supra, the instant brief amicus curiae will concentrate exclusively upon those developments that were not covered in the amicus curiae brief filed by COLLE in Red Ball Motor Freight, Inc. This brief amicus curiae urging the Court to review the questions presented by Pettibone will incorporate by reference the amicus curiae brief filed by COLLE in Red Ball Motor Freight, Inc. and will attempt to limit its discussion to matters not previously presented therein. The instant brief will outline why the allocation of the burden of proof in NLRB unfair labor practice cases is ripe for review and suggest the need for a uniform burden of proof and related questions presented in Connick v.

Myers, No. 81-1251, cert. granted March 8, 1982, and will suggest the need for an appropriate accommodation between the Court's apparently divergent views on the question of the burden of proof as expressed in Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977), and as contrasted to Texas Department of Community Affairs v. Burdine, 450 U.S. 240 (1981). The argument will explore why each of the aforementioned factors require that review be granted at this time.

I

REASONS FOR GRANTING THE WRIT

The NLRB's Wright Line Standard Shifting The Burden Of Proof Of Persuasion Upon Employers Is One Of The Most Important Questions Confronting Employers Upon Which The Courts Of Appeals Are Divided And Which Is Contrary To The Design Of The Statute

The petition by Pettibone is the third time in this term of court that the question of the appropriate burden of proof in unfair labor practice discrimination cases has come before this Court. In Wright Line, A Division of Wright Line, Inc. v. NLRB, 251 NLRB 1083, reversed in part, 662 F.2d 899 (1st Cir. 1981), cert denied , No. 81-987 (March 1, 1982), ___ U.S. ___, the question was

presented in the context of the overall importance of the issue and the failure of the First Circuit to follow the "dominant motive" test which had been the test followed by that circuit for many years. It was the position of Wright Line, as supported by COLLE, that the Board's newly adopted Wright Line doctrine in reliance upon the Court's Mt. Healthy decision, supra, was simply a recasting of the prior "in part" test. It continues to be the position of COLLE that the Board and its General Counsel continue to adhere to a standard that places the burden upon the employer to prove that no part of alleged discriminatory conduct is for a reason protected under Section 7 of the Act.[2]

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2 As COLLE has filed a brief amicus curiae with the Court in the Wright Line case and again in the Red Ball case, COLLE respectfully incorporates by reference its brief amicus curiae in support of the petition in Red Ball Motor Freight, Inc. v. NLRB, No. 81-1605, supra, as fully setting forth the reasons why the amicus curiae believes the issues presented in this case to be of paramount importance, in what respect the courts of appeal continue to remain divided on the proper test for employer motivation, and how the Board's Wright Line test endorsed by the Court of Appeals in Red Ball, supra, and by the Seventh Circuit in the instant case is in fact the reincarnation of the

In Wright Line, the opposition of the government suggested that the issue was not yet ripe for review as most of the courts of appeal were following the Board's Wright Line test. COLLE points out in its brief amicus curiae in Red Ball, incorporated herein by reference, that even those courts of appeal that have adopted the Board's Wright Line approach have not clearly recognized it to be a departure from the "in part" analysis that had previously been the Board's standard.

In Red Ball, the government again principally adopted the opposition it had prepared in Wright Line as the basis for its successful opposition to the granting of review. Red Ball was the first case in which the Court of Appeals had taken direct issue with the views of the First Circuit in Wright Line. Shortly before the consideration by the Court of whether or not to grant review in Red Ball, the Court was informed that the company had filed a petition under Chapter 11 of the

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discredited "in part" analysis. In order to conserve the Court's time, the arguments set forth in COLLE's amicus curiae brief in Red Ball will not be repeated in the instant brief.

Bankruptcy Act. The Court did not indicate whether this factor entered into its decision.

COLLE, which represents a cross-section of large and small employers throughout the United States, fully concurs in the dissenting views expressed by Justice White and Justice Rehnquist in their Memorandum in Red Ball Motor Freight v. NLRB, supra. The dissenting views of Mr. Justice White correctly articulate the division in the circuit courts on the question of whether or not it is the employer or the General Counsel that has the final burden of persuasion in an unfair labor practice case. One of the cases cited in that dissenting memorandum is a decision of the Seventh Circuit in Peavy Co. v. NLRB, 648 F.2d 460 (CA 7, 1981). The Seventh Circuit in the instant case relies upon its decision in Peavy as the correct evidentiary approach stating:

> Accordingly, Pettibone failed to show that the employees would not have been rehired in the absence of their protected conduct."
>
> Pet. App. A-3.

That single line from the decision of the Seventh Circuit in Pettibone demonstrates both the importance of the issue and the error of the court. It also demonstrates that the courts of appeals that have adopted the Board's Wright Line position sub silentio in fact not only as suggested by Justice White in his dissent have shifted to the employer the burden of persuasion but they have, in fact, shifted to the employer the burden of proving that the discharge was not "for cause." Such an analysis not only is in clear contradiction of the statutory design articulated by Congress in its Amendments to Section 10(c) of the Act, in which the Board is interdicted from issuing an order in which an individual is "discharged for cause" (see pp. 13 through 16 of COLLE Brief in Red Ball.) The House Labor Committee explained the amended section 10(c) by stating:

> ... "the Board may not 'infer' improper motive when the evidence shows cause for discipline or discharge."

H.R. Rep. No. 245, 80th Cong.,1st Sess., 42-43 (1947).

The above quoted passage from the Seventh Cricuit Opinion in Pettibone is clearly at

odds with that legislative history [3].

[3] Pettitioner Pettibone, in its petition in footnote 7, p. 5 of Petition for Certiorari, cites to the Court authority designed to remove a possible procedural barrier to the Court's reviewing the instant petition. The amicus curiae respectfully suggests that, while petitioner did not specifically ask the Court of Appeals to find the Board's Wright Line standard to be in error, that is not the same kind of procedural infirmity found by the Court in Woelke & Romero Framing, Inc., Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., Oregon-Columbia Chapter, the Associated General Contractors of America, Inc., v. NLRB, U. S. Sup. Ct. Nos. 80-1798, 80-1808, and 81-91, ___ U.S. ___, decided May 24, 1982. In Woelke & Romero, the Court did not reach the question of whether picketing to obtain a subcontracting clause otherwise lawful was violative of Section 8(b)(4)(A) because that issue had not specifically been raised by Woelke & Romero before the Board. In the instant case, the Board had itself not yet recast its standard for burdens of proof at the time that the Pettibone case was issued. By arguing the merits of its position before the Seventh Circuit, it is respectfully suggested that Pettibone's petition does not fall within the same procedural infirmity recently articulated by the Court in Woelke & Romero. It is respectfully suggested that where the questions involved relate to burdens of proof and evidentiary standards, those questions should be deemed fairly subsumed within an argument on the merits and need not be specifically raised in order to be preserved for appellate review.

The holding of the Seventh Circuit in Pettibone also demonstrates the importance of the issue. It is far too easy for a reviewing court responsible for administering the substantial evidence test to be required to apply a standard in which it appears the employer must carry both the burden of proof as well as the burden of persuasion. Not only does the instant case demonstrate that the issue continues to be one that is constantly recurring but it also demonstrates the considerable difficulty that reviewing courts have in utilizing a standard that is not as clearly defined as that set forth by the Court in Texas Department of Community Affairs v. Burdine, 450 U.S. 240 (1981). Before suggesting to the Court the need for accomodation of the Burdine standard in discrimination cases and the NLRB's current Wright Line standard, it may be useful to briefly examine the facts in the instant case.

In Pettibone, the employees that were key punch operators engaged in protected activity in coming to their employer as a group and suggesting that they should

receive higher wages. The issue in this case, however, is not whether that conduct is an unfair labor practice. Rather, it was stipulated by the parties that all of the key punch operators in question quit their jobs (Pet. App. B-7). The issue of that is presented occurs when these same employees, a number of days later, changed their minds about their voluntary separation and sought re-employment. A discriminatory rehire case as opposed to a discriminatory discharge case is an area where the Board's General Counsel has usually been held to the higher burden of proof in demonstrating that the employer did not have cause for refusing to rehire the particular employees. The employees could have engaged in a strike, and that would have been protected conduct. The Board rules have generally held that conduct which is illegal in nature or other conduct unrelated to protected activity that occurs following the protected activity is a total defense to an employer's refusal to rehire employees. In Offner Electronics, Inc., 134 NLRB 1065 (1961), 49 LRRM 1307, the Board held that

an employer was not required to reinstate an employee who after engaging in protected activity and following her admitted discriminatory discharge engaged in "serious acts of misconduct", 134 NLRB 1064 at 1076, which included an attempt to steal certain confidential documents according to the views of the respondent employer. The Board held, in not ordering reinstatement:

> That she acted as she did at a time when she undoubtedly was upset and distraught is certainly grounds for sympathy on moral exhoneration but it is hardly grounds for requiring respondent to waive its objections to her reinstatement if it insisted upon them."

Offner Electronics, 134 NLRB 1064 at 1077.

Offner Electronics is still good law which has not been reversed by the Board. In Pettibone, the employees, like Mrs. Bojan in Offner, can be given moral sympathy in their concerted voluntary resignation from the firm but an employer should not be required to rehire employees who take it upon themselves to walk off their jobs and quit. The basis of the NLRB's decision which was affirmed by the court below was a requirement that the employer had not

sufficiently disproved that its rule of not rehiring persons who quit without notive was a recent fabrication because the employer could not prove that this rule had been broadly applied. This certainly is not the place to argue or re-argue the merits of the case. But it seems to the amicus curiae that this factual recitation demonstrates the importance in NLRB cases for a proper allocation of the burden of proof. Not only did Congress intend in 1947 to clearly place that burden upon the Board but a case such as the instant one demonstrates how arcane analysis in evidentiary standards not only totally frustrates the Congressional design but also is contrary to a common sense approach to the accommodation of activities for concerted action protected under Section 7 of the Act and the economic necessity of an employer to be able to run his business where the employer's actions are not based upon discriminatory conduct. Whatever discrimination Pettibone may have engaged in, in its verbal refusal to go along with the pay increase, clearly came to rest

when the employees quit and no amount of legerdemain should enable the Board or a reviewing court to require that an employer justify a business decision not to rehire employees that have once quit.

II

THE NLRB'S WRIGHT LINE STANDARD IS INCONSISTENT AND IN CONFLICT WITH THE DECISIONS OF THIS COURT

A. The NLRB Wright Line Standard Is An Improper Variation Of The Mt. Healthy Standard

In Wright Line v. NLRB, supra, the Board ostensibly backed away from the "in part" test and claimed to be adopting the test set down by this Court in Mt. Healthy Board of Education v. Doyle, supra. Under the Court's Mt. Healthy burden of proof standard, an employee who is the alleged discriminatee bears the burden of establishing a threshold showing that the conduct in question is protected and was a "...substantial or motivating factor in the actual discharge." 429 U.S. at 286. Mt. Healthy suggests that the appropriate standard in measuring the burden of proof should be the "dominant motive" test. A true Mt. Healthy test contemplates a

dominant motive analysis. See "Toward Rationality In Discrimination Discharge Cases, The Impact Of Mt. Healthy Board of Education v. Doyle Upon The NLRA," 66 Georgetown Law Journal 1109 (1978). William H. DuRoss, now Associate Solicitor, U. S. Department of Labor, analyzed this Court's Mt. Healthy decision in terms of the divergent views of the various circuit courts and correctly concluded that the ..."proper balance between the employer's ... right to exercise control over his work force and the employee's right to be protected from discrimination based on pro-union activity" ... is the "dominant motive" test as articulated by the Court in Mt. Healthy in the context of the First Amendment and as set forth by the First Circuit in NLRB v. Whitten Machine Works, 204 F.2d 883 (1st Cir. 1953), enforcing 100 NLRB 279, 66 Georgetown Law Journal 1109, 1110, 1111 and 1114. In Whitten Machine, the First Circuit placed the burden of proof in dual motive discharge cases upon the NLRB holding that an employee's discharge would violate the

Labor Act only when the protected activity ... "weighed more heavily on the decision to fire [the employee] -- than did the dissatisfaction with his performance ...", 204 F.2d 883 at 887. Mr. DuRoss, in his Law Review Article, aptly points out that the First Circuit ten years later in NLRB v. Lowell Sun Publishing, 320 F.2d 835, reversing in part 136 NLRB 206 (1967), held that in applying the "'dominant motive' standard ... the Board must prove that 'but for' pro-union activity, the employer would have considered the employee's misconduct grounds for discharge." 66 Georgetown Law Journal at 1111.

The best analysis of what the Board's Wright Line approach really is can be found in the 45th Annual Report of the NLRB for the year 1980, in which the Board places its Wright Line standard in perspective. See Exhibit A attached to this Brief. In this annual report, the Board refers to the Mt. Healthy test as requiring that:

> ... the General Counsel to make a prima facie showing sufficient to support the inference that an employee's protected

> conduct was a motivating factor in the employer's disciplinary action. Once this is established, the burden will then shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

See Exhibit A-1. The Board, thus, has shifted away from the "but for" analysis called for in Lowell Publishing and has shifted away from a strict following of Mt. Healthy by merely requiring that some evidence be estblished by the General Counsel from which an "inference" could be drawn that the proscribed conduct was a motivating factor. The "but for" test, rather than being placed upon the Board, is placed upon the employer. This is not a correct "dominant motive" test and not a correct Mt. Healthy standard. The Board's Annual Report acknowledges that its interpretation of Mt. Healthy does not include an adoption of the "dominant motive" test (see attached Exhibit A-3). The Board acknowledges in the Annual Report that:

> ... under the "dominant motive" test, the General Counsel not only has to establish a prima facie

> showing of unlawful motive but he is also required to rebut the employer's asserted defense by demonstrating that the discharge would not have taken place place in the absence of the employee's protected activities. Exhibit A-3 attached.

We respectfully suggest that the "dominant motive" test is the test that is consistent with the statutory design of the Labor Act rather than the Board's Mt. Healthy interpretation. We submit that the Board improperly relied upon Mt. Healthy as being consistent with NLRB v. Great Dane Trailer, Inc., 388 U.S. 26. The Board's 1980 Annual Report states:

> ... "the shifting burden process in Mt. Healthy was consistent with the process envisioned by Congress (and the Supreme Court's Decision in Great Dane. [See attached Exhibit A-3 & 4.]

We respectfully suggest, consistent with the views of Mr. DuRoss and his learned Law Review article, that in Great Dane the Court in fact removed the burden of proof from the NLRB only in a limited group of cases in which "the employer's discriminatory conduct could be inherently destructive." 66 Georgetown Law Journal 1109 at 1126.

B. The Tension Between Texas Dept. of Community Affairs v. Burdine And Mt. Healthy Should Also Be Resolved In NLRB Discrimination Cases

The Court has granted certiorari in Connick v. Myers, No. 81-1251, on March 8, 1982. In Connick v. Myers, the Court will decide the appropriate standard and burden of proof with regard to the dismissal of a public employee. The Petitioner in Connick correctly urges that there is need to resolve the conflict between Burdine and Mt. Healthy. Similarly, in the private sector, in matters involving the NLRA, the tension between Mt. Healthy and Burdine must be addressed. It is especially appropriate to review the instant case as a related case to Connick v. Myers as the NLRB in its Wright Line standard has relied upon the Court's Mt. Healthy decision. The amicus curiae respectfully suggests that Burdine more accurately reflects the appropriate burden of proof required under the National Labor Relations Act. In considering the tension between Mt. Healthy and Burdine, the Court will also have the opportunity of considering the appropriateness of the "dominant motive" standard as originally

enunciated by the First Circuit rather than the Board's current interpretation of Mt. Healthy.

The facts and holding of the Seventh Circuit in the instant case make Pettibone an ideal vehicle for accommodating NLRB dual motive discharge cases with the burden of proof that the Court will deem to be appropriate in the public sector in Connick v. Myers, supra.

CONCLUSION

For the reasons set forth in the instant brief amicus curiae and for the reasons set forth in the brief amicus curiae filed by COLLE with the Court in Red Ball Motor Freight, Inc. v. NLRB, No. 81-1605, the petition for certiorari in Pettibone should be granted.

Respectfully submitted,

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June, 1982

B. Employer Discrimination in Conditions of Employment

1. Proof of Discriminatory Motivation

In Wright Line, a Div. of Wright Line,[56] the Board formally set forth a test of causation, based on an analysis akin to that used by the Supreme Court in Mt. Healthy[57] for all cases alleging violations of section 8(a)(3) or violations of section 8(a)(1) turning on employer motivation. In adopting what it referred to as the Mt. Healthy test, the Board stated tht it first shall require the General Counsel to make a prima facie showing sufficient to support the inference that an employee's protected conduct was a motivating factor in the employer's disciplinary action. Once this is established, the burden will then shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

After discussing the distinction between pretext and dual motive, the "in part" test, and the advent of the "dominant motive" test and the law of the

[56] 251 NLRB No.150 (Chairman Fanning and Members Penello and Truesdale, Member Jenkins concurring).

[57] Mt. Healthy City School Dist. Bd. of Education v. Doyle, 429 U.S. 274 (1977).

courts, the Board examined the Mt. Healthy case, where an untenured teacher had brought suit against the school board, alleging that it had wrongfully refused to renew his contract. The district court found that of the two reasons cited by the school board for its action, one involved unprotected conduct while the second was clearly protected by the first and fourteenth amendments. The district court reasoned that since protected activity had played a substantial part in the school board's decision, its refusal to renew the contract was improper and the teacher was, therefore, entitled to reinstatement and backpay. After the court of appeals affirmed, per curiam, the Supreme Court reversed, in a unanimous opinion, rejecting the lower court's application of such a limited "in part" test and ruling that the school board must be given an opportunity to establish that its decision not to renew would have been the same if the protected activity had not occurred. Thus, in the Board's view, the Court established the two-part test, described above, to be applied in a dual-motivation context.

The Board concluded that Mt. Healthy represents a rejection of the "in part" test which stops with the establishment of a prima facie case or a consideration of an improper motive. It also found that the "dominant motive" test fared no better because Mt. Healthy shifted the burden of proof to different parties. Under the "dominant motive" test, the General Counsel not only has to establish a prima facie showing of unlawful motive, but he is also required to rebut the employer's asserted defense by demonstrating that the discharge would not have taken place in the absence of the employees' protected activities. However, under Mt. Healthy, after the General Counsel establishes a prima facie case of employer reliance on protected activity, the burden shifts to the employer to demonstrate that the decision would have been the same in the absence of protected activity. In the Board's view, this distinction is a crucial one since the decision as to who bears this burden can be determinative.

After considering the legislative history of the Act and the Supreme Court's

decision in Great Dane [58], the Board concluded that the shifting burden process in Mt. Healthy was consistent with the process envisioned by Congress and the Supreme Court to resolve discrimination cases. Further, it pointed out that, although not couched in the language of Mt. Healthy, this is the same process that the Board has sought to use in analyzing such issues. Thus, the Board's decisional process traditionally has involved, first, an inquiry as to whether protected activities played a role in the employer's action and, if so, a subsequent inquiry as to whether any legitimate business reason asserted by the employer is sufficiently proven to be the cause of the discipline to negate the General Counsel's showing of prohibited motivation.

Perhaps most important for its purposes is the fact that the Mt. Healthy procedure accommodates the legitimate competing interests inherent in dual-motivation cases, while at the same time serving to effectuate the policies and objectives of section 8(a)(3) of the Act.

[58] N.L.R.B. v. Great Dane Trailers, 388 U.S. 26 (1967).

Under this test, the aggrieved employee is afforded protection since he or she is only required initially to show that protected activities played a role in the employer's decision, while the employer is provided with a formal framework within which to establish that the discipline or other action would have occurred absent the employee's protected activities. Further, the Board found it to be of substantial importance that its explication of this test of causation will serve to alleviate the confusion which now exists at various levels of the decisional process by providing litigants and the decisionmaking bodies with a uniform test to be applied in 8(a)(3) cases. Finally, the Board recognized that inherent in the adoption of the Mt. Healthy test is its recognition of the advantage of clearing the air by abandoning the "in part" language in expressing its conclusion as to whether the Act was violated without repudiating the well-established principles and concepts which have been applied in the past.

In applying the Mt. Healthy test to the facts in the instant case, the Board found that the General Counsel had made a prima facie showing that the employee's union activity was a motivating fact in the employer's decision to discharge him, and that the employer failed to demonstrate that it would have taken the same action against the employee in the absence of his engaging in union activities. For these reasons, they agreed with the administrative law judge's finding that the employer violated section 8(a)(3) of the Act.

Concurring Member Jenkins was willing to apply the shifting burden-of-proof standard his colleagues adopted in this case. Although finding that this standard may suffice for most cases, he stated that there may remain a residue, perhaps small, of cases of mixed motive or cause, where the purposes are so interlocked that it is not possible to point to one of them as "the" cause. Where the evidence does not permit the isolation of a single event or motive as the cause of the discharge, Member Jenkins concluded that the unlawful motive must be deemed to be part of the

cause of discharge, and the discharge is unlawful. In his view, it is fair that the party who created this situation, in which isolation of a single cause is impossible, bear the burden created by the venture into an area prohibited by the Act. Member Jenkins therefore found that the "in part" standard as distinguished from the "but for" and "dominant motive" tests is the only criterion which will effectuate the purposes of the statute. Noting that the legislative hsitory shows plainly that Congress itself struck this balance, he read Mt. Healthy as also in effect adopting this standard. His only reservation now is the way in which the shifting burden-of-proof standard may be applied to prevent unlawful conduct. If experience shows it to be inadequate in application, he believed that modification may be required.